

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROSA MORISHITA,

Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

Case No. EDCV 13-2107-JEM

MEMORANDUM OPINION AND
ORDER AFFIRMING DECISION OF
THE COMMISSIONER OF SOCIAL
SECURITY

PROCEEDINGS

On November 27, 2013, Rosa Morishita ("Plaintiff" or "Claimant") filed a complaint seeking review of the decision by the Commissioner of Social Security ("Commissioner") denying Plaintiff's applications for Widow's Insurance Benefits and Supplemental Social Security Income benefits. The Commissioner filed an Answer on March 5, 2014. On June 18, 2014, the parties filed a Joint Stipulation ("JS"). The matter is now ready for decision.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record ("AR"), the Court concludes that the Commissioner's decision must be affirmed and this case dismissed with prejudice.

BACKGROUND

Plaintiff is a 55-year-old female who applied for Social Security Widow's Insurance Benefits¹ and Supplemental Security Income benefits on June 2, 2011, alleging disability beginning December 2, 2008. (AR 10.) The ALJ determined that Plaintiff has not engaged in substantial gainful activity since December 2, 2008, the alleged onset date. (AR 12.)

Plaintiff's claims were denied initially on June 30, 2011, and on reconsideration on September 15, 2011. (AR 10.) Plaintiff filed a timely request for hearing, which was held before Administrative Law Judge ("ALJ") Alan J. Markiewicz on August 9, 2012, in Moreno Valley, California. (AR 10.) Claimant appeared and testified at the hearing and was represented by counsel. (AR 10.) Vocational expert ("VE") Kristan V. Sagliocco also appeared and testified at the hearing. (AR 10.)

The ALJ issued an unfavorable decision on August 31, 2012. (AR 10-18.) The Appeals Council denied review on September 26, 2013. (AR 1-3.)

DISPUTED ISSUES

As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as grounds for reversal and remand:

1. Whether the ALJ has properly considered the relevant medical evidence of record in assessing Ms. Morishita's residual functional capacity.
2. Whether the decision properly considered Ms. Morishita's subjective complaints and properly assessed her credibility.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan,

¹ It was previously found that Claimant is the unmarried widow of the deceased insured worker and had attained the age of 50 on the alleged disability onset date. She met the non-disability requirements for disabled widow's benefits set forth in Section 202(e) of the Social Security Act. (AR 12, 16.)

1 924 F.2d 841, 846 (9th Cir. 1991) (ALJ's disability determination must be supported by
2 substantial evidence and based on the proper legal standards).

3 Substantial evidence means "more than a mere scintilla,' but less than a
4 preponderance." Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting
5 Richardson v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is "such
6 relevant evidence as a reasonable mind might accept as adequate to support a
7 conclusion." Richardson, 402 U.S. at 401 (internal quotation marks and citation
8 omitted).

9 This Court must review the record as a whole and consider adverse as well as
10 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).
11 Where evidence is susceptible to more than one rational interpretation, the ALJ's
12 decision must be upheld. Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599
13 (9th Cir. 1999). "However, a reviewing court must consider the entire record as a whole
14 and may not affirm simply by isolating a 'specific quantum of supporting evidence.'" Robbins,
15 466 F.3d at 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
16 1989)); see also Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

17 THE SEQUENTIAL EVALUATION

18 The Social Security Act defines disability as the "inability to engage in any
19 substantial gainful activity by reason of any medically determinable physical or mental
20 impairment which can be expected to result in death or . . . can be expected to last for a
21 continuous period of not less than 12 months." 42 U.S.C. §§ 423(d)(1)(A),
22 1382c(a)(3)(A). The Commissioner has established a five-step sequential process to
23 determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

24 The first step is to determine whether the claimant is presently engaging in
25 substantial gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the
26 claimant is engaging in substantial gainful activity, disability benefits will be denied.
27 Bowen v. Yuckert, 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether
28 the claimant has a severe impairment or combination of impairments. Parra, 481 F.3d at

1 746. An impairment is not severe if it does not significantly limit the claimant's ability to
2 work. Smolen, 80 F.3d at 1290. Third, the ALJ must determine whether the impairment
3 is listed, or equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I
4 of the regulations. Parra, 481 F.3d at 746. If the impairment meets or equals one of the
5 listed impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482 U.S.
6 at 141. Fourth, the ALJ must determine whether the impairment prevents the claimant
7 from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).

8 Before making the step four determination, the ALJ first must determine the
9 claimant's residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The RFC is
10 "the most [one] can still do despite [his or her] limitations" and represents an assessment
11 "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). The
12 RFC must consider all of the claimant's impairments, including those that are not severe.
13 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

14 If the claimant cannot perform his or her past relevant work or has no past
15 relevant work, the ALJ proceeds to the fifth step and must determine whether the
16 impairment prevents the claimant from performing any other substantial gainful activity.
17 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000). The claimant bears the burden of
18 proving steps one through four, consistent with the general rule that at all times the
19 burden is on the claimant to establish his or her entitlement to benefits. Parra, 481 F.3d
20 at 746. Once this prima facie case is established by the claimant, the burden shifts to
21 the Commissioner to show that the claimant may perform other gainful activity.
22 Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a
23 claimant is not disabled at step five, the Commissioner must provide evidence
24 demonstrating that other work exists in significant numbers in the national economy that
25 the claimant can do, given his or her RFC, age, education, and work experience. 20
26 C.F.R. § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is
27 disabled and entitled to benefits. Id.

THE ALJ DECISION

1
2 In this case, the ALJ determined at step one of the sequential process that Plaintiff
3 has not engaged in substantial gainful activity since December 2, 2008, the alleged
4 onset date. (AR 12.)

5 At step two, the ALJ determined that Plaintiff has the following medically
6 determinable severe impairments: diabetes, hypertension, heart arrhythmia, and arthritis
7 of the left shoulder (20 C.F.R. §§ 404.1520(c) and 416.920(c)). (AR 12-13.)

8 At step three, the ALJ determined that Plaintiff does not have an impairment or
9 combination of impairments that meets or medically equals the severity of one of the
10 listed impairments. (AR 13.)

11 The ALJ then found that Plaintiff has the RFC to perform light work as defined in
12 20 C.F.R. §§ 404.1567(b) and 416.967(b) with the following limitations:

13 Claimant can lift and/or carry 20 pounds occasionally and 10 pounds
14 frequently. She can stand and/or walk for six hours of an eight-hour
15 workday with regular breaks. She can sit for six hours out of an eight-
16 hour workday with regular breaks. She is unlimited with respect for
17 pushing and/or pulling, other than as indicated for lifting and/or
18 carrying. She has no postural limitations. She is limited to occasional
19 overhead reaching with the left upper extremity.

20 (AR 13-16.) In determining this RFC, the ALJ made an adverse credibility determination.
21 (AR 14.)

22 At step four, the ALJ found that Plaintiff is unable to perform her past relevant
23 work as a marker in the retail industry. (AR 16.) The ALJ, however, also found that,
24 considering Claimant's age, education, work experience and RFC, there are jobs that
25 exist in significant numbers in the national economy that Claimant can perform, including
26 inspector, assembler and sorter. (AR 17.)

27 Consequently, the ALJ found that Claimant was not disabled within the meaning of
28 the Social Security Act. (AR 17.)

DISCUSSION

The ALJ decision must be affirmed. The ALJ properly considered the medical evidence and properly discounted Plaintiff's credibility. The ALJ's RFC is supported by substantial evidence. The ALJ's nondisability determination is supported by substantial evidence and free of legal error.

I. THE ALJ PROPERLY CONSIDERED THE MEDICAL EVIDENCE

A. Relevant Federal Law

The ALJ's RFC is not a medical determination but an administrative finding or legal decision reserved to the Commissioner based on consideration of all the relevant evidence, including medical evidence, lay witnesses, and subjective symptoms. See SSR 96-5p; 20 C.F.R. § 1527(e). In determining a claimant's RFC, an ALJ must consider all relevant evidence in the record, including medical records, lay evidence, and the effects of symptoms, including pain reasonably attributable to the medical condition. Robbins, 446 F.3d at 883.

In evaluating medical opinions, the case law and regulations distinguish among the opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant (non-examining, or consulting, physicians). See 20 C.F.R. §§ 404.1527, 416.927; see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). In general, an ALJ must accord special weight to a treating physician's opinion because a treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citation omitted). If a treating source's opinion on the issues of the nature and severity of a claimant's impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is not inconsistent with other substantial evidence in the case record, the ALJ must give it "controlling weight." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

1 Where a treating doctor's opinion is not contradicted by another doctor, it may be
2 rejected only for "clear and convincing" reasons. Lester, 81 F.3d at 830. However, if the
3 treating physician's opinion is contradicted by another doctor, such as an examining
4 physician, the ALJ may reject the treating physician's opinion by providing specific,
5 legitimate reasons, supported by substantial evidence in the record. Lester, 81 F.3d at
6 830-31; see also Orn, 495 F.3d at 632; Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir.
7 2002). Where a treating physician's opinion is contradicted by an examining
8 professional's opinion, the Commissioner may resolve the conflict by relying on the
9 examining physician's opinion if the examining physician's opinion is supported by
10 different, independent clinical findings. See Andrews v. Shalala, 53 F.3d 1035, 1041
11 (9th Cir. 1995); Orn, 495 F.3d at 632. Similarly, to reject an uncontradicted opinion of an
12 examining physician, an ALJ must provide clear and convincing reasons. Bayliss v.
13 Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005). If an examining physician's opinion is
14 contradicted by another physician's opinion, an ALJ must provide specific and legitimate
15 reasons to reject it. Id. However, "[t]he opinion of a non-examining physician cannot by
16 itself constitute substantial evidence that justifies the rejection of the opinion of either an
17 examining physician or a treating physician"; such an opinion may serve as substantial
18 evidence only when it is consistent with and supported by other independent evidence in
19 the record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at 600.

20 **B. Analysis**

21 Plaintiff contends that the ALJ's RFC is flawed in two respects. Plaintiff argues
22 that the ALJ's RFC should have required a cane for ambulation and included a limitation
23 to occasional reaching in all directions with her left upper extremity. The ALJ's RFC,
24 however, is supported by substantial evidence.

25 1. Need For A Cane

26 As to the need for a cane, the ALJ specifically found that Claimant's medically
27 determinable impairments of right knee pain, cervical spine pain and lumbar spine pain
28 are nonsevere. (AR 13.) The ALJ found no medical evidence of left leg pain. (AR 13.)

1 Accordingly, the ALJ's light work RFC indicates Plaintiff can stand and/or walk for six
2 hours out of the eight hour day. (AR 13.) No cane was required. (AR 12.) In support of
3 his RFC, the ALJ specifically found that "the evidence does not support the Claimant's
4 statements regarding the need for a cane." (AR 14.) Claimant testified at the hearing
5 she started using a cane in July 2012 (AR 14), only a month before the hearing. The
6 ALJ noted that physical therapy records from June and July 2012 confirm some difficulty
7 with ambulation but do not reflect that Claimant needs an assistive device. (AR 14-15.)
8 One record (June 6, 2012) cited by the ALJ checked "not applicable" as to the need for
9 an assistive device. (AR 15, 355.) The ALJ also noted that a review of the records
10 reveals no restrictions recommended by the treating doctor. (AR 15.)

11 The omission of the need for a cane, if supported, would not be harmless error
12 because the occupations identified by the VE would be eliminated. (AR 58.) SSR 96-
13 9p, however, requires "medical documentation of the need for a hand-held assistive
14 device to aid in walking or standing, and describing the circumstances for which it is
15 needed." Here, Claimant contends she is and should be using a cane and was given a
16 cane through the physical therapy program. (AR 13, 43-44.) Her treating doctor,
17 however, did not make any finding that a cane was needed, nor give a prescription for a
18 cane or provide other medical documentation that establishes a cane is medically
19 necessary and that describes the circumstances or how often Plaintiff would need to use
20 a cane. Only a physician is an acceptable medical source regarding an impairment. 42
21 U.S.C. § 404.1513(a). Physical therapists are not. Id.

22 Plaintiff focuses on physical therapy notes that found she has a problem with
23 balance and a decreased functional gait. Physical therapist statements may be used as
24 evidence of the severity of an impairment and of how it affects a claimant's ability to
25 work. 42 U.S.C. § 404.1513(d). Claimant, however, fails to offer a complete and fair
26 summary of the physical therapy notes. As Claimant herself notes, the physical therapy
27 program set goals for Claimant's improvement. (AR 354-361.) The physical therapy
28 records indicate Claimant's condition improved with treatment. Id. On June 12, 2012,

1 Plaintiff managed the stair stepper well and had decreased pain. (AR 357.) On June
2 18, 2012, Plaintiff performed single leg stance training, cone stepping, line walking and
3 biking. (AR 358.) On June 21, 2012, Plaintiff's dynamic balance improved and she
4 reported no pain following treatment. (AR 359.) By July 3, 2012, Plaintiff improved her
5 single leg balance and endurance in walking, and experienced minimal pain in her lower
6 extremities. (AR 360-361.)

7 At best, the evidence regarding the severity of Plaintiff's ambulatory impairments
8 is conflicting. Plaintiff simply disagrees with the ALJ's finding regarding the medical
9 evidence but the ALJ is the one responsible for resolving conflicts in the medical
10 evidence and ambiguities in the record. Andrews, 53 F.3d at 1039. Where the ALJ's
11 interpretation of the record is reasonable as it is here, it should not be second-guessed.
12 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

13 2. Overhead Reaching Limitation

14 State agency physicians opined that Plaintiff could perform medium exertional
15 level work with occasional reaching with the left upper extremity. (AR 16.) The ALJ,
16 however, reduced her RFC to light work to account for the arthritis in her left shoulder,
17 her back pain, her cervical spine pain and the side effects of her medication. (AR 16.)
18 The limitation to occasional overhead reaching with the left upper extremity remained.
19 (AR 13.)

20 Plaintiff challenges the ALJ's RFC overhead reaching limitation because two State
21 agency physicians limited Plaintiff to occasional reaching with the left upper extremity in
22 front and/or laterally as well as overhead. (AR 71-72, 89-90.) With this expanded
23 reaching limitation, the VE testified Plaintiff would not be able to perform her past
24 relevant work. (AR 52.) The VE also testified that the positions of inspector, assembler
25 and sorter (AR 17) could not be performed with the expanded reaching limitation. (AR
26 56-57.)

27 The problem with Plaintiff's argument is that there are light jobs with occasional
28 but no expanded reaching or no reaching at all. The ALJ specifically asked the VE if

1 Plaintiff could perform any jobs with a limitation on reaching in any direction, and the VE
 2 gave three light work jobs: fruit distributor (921.685-046), conveyor worker (524.687-
 3 022) and usher (344.677-014). (AR 57-58.) The DOT characterizes these jobs as
 4 involving “occasional” reaching but the VE testified that the DOT does not distinguish
 5 between types of reaching. (AR 52.) The VE relied on her experience in determining
 6 that these jobs did not involve expanded reaching and could be performed by Plaintiff.
 7 (AR 57-58); Bayliss, 427 F.3d 1211, 1218 (9th Cir. 2005) (VE’s recognized expertise
 8 provides foundation for his or her testimony; no additional foundation is required).
 9 Additionally, the agency’s disability determination identified three jobs where reaching
 10 was “not present”: school bus monitor (372.667-042), barker (342.657-010) and
 11 hostess (349.667-014). (AR 73, 79.) Thus, even with the extended reaching limitation,
 12 Plaintiff would not be disabled. Any error in the scope of the upper left extremity
 13 limitation was harmless. Stout v. Comm’r Soc. Sec. Admin., 454 F.3d 1050, 1056 (9th
 14 Cir. 2006).

15 * * *

16 The ALJ properly considered the medical evidence in assessing Plaintiff’s RFC.
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18 **II. THE ALJ PROPERLY DISCOUNTED PLAINTIFF’S CREDIBILITY**

19 **A. Relevant Federal Law**

20 The test for deciding whether to accept a claimant’s subjective symptom testimony
 21 turns on whether the claimant produces medical evidence of an impairment that
 22 reasonably could be expected to produce the pain or other symptoms alleged. Bunnell
 23 v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); see also Reddick, 157 F.3d at 722;
 24 Smolen, 80 F.3d at 1281-82 esp. n.2. The Commissioner may not discredit a claimant’s
 25 testimony on the severity of symptoms merely because they are unsupported by
 26 objective medical evidence. Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If
 27 the ALJ finds the claimant’s pain testimony not credible, the ALJ “must specifically make
 28 findings which support this conclusion.” Bunnell, 947 F.2d at 345. The ALJ must set

1 forth “findings sufficiently specific to permit the court to conclude that the ALJ did not
 2 arbitrarily discredit claimant’s testimony.” Thomas, 278 F.3d at 958; see also Rollins,
 3 261 F.3d at 856-57; Bunnell, 947 F.2d at 345-46. Unless there is evidence of
 4 malingering, the ALJ can reject the claimant’s testimony about the severity of a
 5 claimant’s symptoms only by offering “specific, clear and convincing reasons for doing
 6 so.” Smolen, 80 F.3d at 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must
 7 identify what testimony is not credible and what evidence discredits the testimony.
 8 Reddick, 157 F.3d at 722; Smolen, 80 F.3d at 1284.

9 **B. Analysis**

10 In determining Plaintiff’s RFC, the ALJ concluded that Claimant’s medically
 11 determinable impairments reasonably could be expected to cause some of the alleged
 12 symptoms. (AR 15.) The ALJ, however, also found that Plaintiff’s statements regarding
 13 the intensity, persistence and limiting effects of these symptoms were “not credible” to
 14 the extent inconsistent with the ALJ’s RFC. (AR 15.) Because the ALJ did not make a
 15 finding of malingering, he was required to provide clear and convincing reasons
 16 supported by substantial evidence to discount Plaintiff’s credibility. Smolen, 80 F.3d at
 17 1283-84. The ALJ did so.

18 First, the ALJ found that the objective medical evidence does not support the
 19 alleged severity of the symptoms. (AR 16.) An ALJ is entitled to consider whether there
 20 is a lack of medical evidence to corroborate a claimant’s alleged pain symptoms so long
 21 as it is not the only reason for discounting a claimant’s credibility. Burch v. Barnhart, 400
 22 F.3d 676, 680-81 (9th Cir. 2005). Here, the ALJ found that the medical evidence
 23 established that Plaintiff’s impairments of right knee pain, cervical spine pain and lumbar
 24 spine pain were not severe and would have no more than minimal effect on her ability to
 25 work. (AR 13.) There was no medical evidence to support claims of left leg pain. (AR
 26 13.) As already noted, there is no medical evidence supporting the need for a cane to
 27 ambulate. (AR 14-15.) The medical evidence establishes that Claimant has the severe
 28 impairment of left shoulder arthritis but the ALJ accommodated this impairment by

1 limiting Plaintiff to occasional overhead reaching (AR 15-16) and there are light jobs that
2 involve only occasional reaching or no reaching at all. Plaintiff suffers from hypertension
3 but there is no evidence of any end organ damage. (AR 14-15.) She also has an
4 irregular heart beat but is not taking any medication for the condition, no surgery was
5 recommended and she has not been seen by a specialist for this condition. (AR 14-15.)

6 Plaintiff has type 2 diabetes but there is no medical evidence indicating end organ
7 damage, neuropathy, acidosis or visual impairments. (AR 14.) She takes appropriate
8 medications to control her diabetes and which have been effective in controlling her
9 symptoms. (AR 14-15.) Impairments that can be controlled effectively with medication
10 are not disabling for purposes of Social Security benefits. Warre v. Comm's of Soc.
11 Sec., 439 F.3d 1001, 1006 (9th Cir. 2006).

12 The ALJ also noted that the record "reveals no restrictions recommended by the
13 treating doctor," which would be expected for someone alleging total disability. (AR 15.)
14 Plaintiff challenges this finding, asserting that no one ever asked her treating physicians
15 for work restrictions. This is not a convincing argument. Nothing prevented Plaintiff from
16 making that request of her physicians as typically occurs. Additionally, the State agency
17 physicians did not regard Plaintiff as disabled (AR 70), did not regard her as entirely
18 credible (AR 71, 88) and did assess her with nondisabling limitations.

19 The ALJ properly discounted Plaintiff's credibility for clear and convincing reasons
20 supported by substantial evidence.

21 * * *

22 The ALJ's RFC is supported by substantial evidence. The ALJ's nondisability
23 determination is supported by substantial evidence and free of legal error.

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ORDER

IT IS HEREBY ORDERED that Judgment be entered affirming the decision of the Commissioner of Social Security and dismissing this case with prejudice.

DATED: August 13, 2014

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE